FILE COPY

Office - Supreme Court, U. S.
FILED
MAY 17 1943
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 1030

CRESCENT EXPRESS LINES, INC.,
Appellant,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, HUDSON TRANSIT LINES, INC., ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

STATEMENT OF HUDSON TRANSIT LINES, INC., OPPOSING JURISDICTION AND MOTION TO AFFIRM.

JAMES F. X. O'BRIEN,
Counsel for Appellee, Hudson Transit Lines, Inc.

INDEX.

Subject Index.

	Page
Motion to affirm	1
Statement opposing jurisdiction	3
Statement of issues	3
Statement of fact	4
First issue	7
Second issue	13
Third issue	15

Table of Cases Cited.

Barrett v. *Van Pelt*, 268 U. S. 85	12
Costanzo v. *Tillinghast*, 287 U. S. 341	12
Dominic Machise, 27 M. C. C. 668	8
Fleischman v. *U. S.*, 270 U. S. 349	12
Helvering v. *New York Trust Co.*, 292 U. S. 455	12
Morgan v. *U. S.*, 298 U. S. 468	15
Nudelman case, 28 M. C. C. 91	6, 8
Price v. *Forrest*, 173 U. S. 410	11
Rector v. *U. S.*, 143 U. S. 457	11
Royal Cadillac Service v. *U. S.*, 63 Sup. Ct. 158	14
Sullivan County Highway Lines, Inc., 21 M. C. C. 717	6, 12
United States v. *Carolina Freight Carriers Corp.*, 315 U. S. 475, 62 Sup. Ct. 722	7, 9, 11
United States v. *Maher*, 307 U. S. 148	7, 9
Visceglia, et al. v. *U. S.*, 24 Fed. Supp. 355	16

Statutes Cited.

U. S. Code, Title 39:	
Section 306a	7, 9
Section 307a	7, 14
Section 308a	3, 5, 7, 8, 9

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil 19-339

CRESCENT EXPRESS LINES, INC.,
Plaintiff-Appellant,

vs.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, ET ALS.,
Defendants-Appellees.

MOTION TO AFFIRM.

To: George H. Rosen, Esq., Attorney for Appellant, 302 Broadway, New York, New York.

SIR:

Please Take Notice that the defendant-appellee, Hudson Transit Lines, Inc., does, pursuant to Rule 12, Paragraph 3, and pursuant to Rule 7, Paragraph 4, move to affirm the order and decree of the District Court in the above entitled cause upon the ground that the questions involved in the appeal to the Supreme Court of the United States are so unsubstantial as not to need further argument, and that the Statement as to Jurisdiction filed by the appellant does not

disclose any adequate statement of grounds indicating th
the questions involved are substantial as required by Ru
12, Paragraph 1. In this motion, we shall rely upon t
Statement Against Jurisdiction annexed hereto and file
herewith, and likewise upon the contents of any simil
Statements or Motions made by other appellees herein.

Yours very truly,

JAMES F. X. O'BRIEN,
Attorney for Appellee,
Hudson Transit Lines,
17 Academy St., Newark, N. J.

Dated: May 5, 1943.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil 19-339

CRESCENT EXPRESS LINES, INC.,
Plaintiff-Appellant,

vs.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, ET ALS.,
Defendants-Appellees.

STATEMENT AGAINST JURISDICTION.

Pursuant to Rule 12, Paragraph 3 of the Supreme Court Rules, Hudson Transit Lines, Inc., an intervenor-defendant, and appellee herein, presents this Statement Against Jurisdiction, and respectfully submits that the questions involved in the instant appeal to the United States Supreme Court are so insubstantial as not to need further argument.

Statement of Issues.

The appellant in this appeal to the Supreme Court raises three issues.

The first issue is that the Interstate Commerce Commission and the District Court improperly interpreted Section 308 (a) of Title 39, U. S. Code, in restricting appellant as a

Grandfather common carrier to the same type of service rendered by it on and prior to the Grandfather date.

The second issue raised is that the Commission erred and the Court erred in affirming the action of the Commission in defining the type of plaintiff's Grandfather service as door to door service over irregular routes in non-scheduled operations.

The third issue raised is that the Commission erred in procedure, and that the appellant was deprived of rights without hearing, and that the Court erred in affirming the Commission's action in this respect.

Statement of Fact.

The issues raised by appellant are either unsubstantial or fictitious when examined in the light of the undisputed facts of the case and the existing statutes and court decisions.

The appellant, Crescent Express Lines, Inc., was a Grandfather common carrier operator engaged in a specialized type of service which can, for sake of description, best be called an interstate livery service. The facts concerning its operations consist of its sworn applications filed with the Commission, and of documents and affidavits submitted to and filed with the Commission by appellant itself.

There never has been a dispute of facts in the case.

The only issue that arose was what type of certificate Crescent was entitled to under the law in the light of the facts which it presented.

The applications and the affidavits, all a part of the Commission's record and made a part of the proceedings in the District Court through the submission of a certified copy thereof, are before this Court and may be referred to in verification of any references made thereto. They show that appellant described its service as a radial, territorial

service in which it picked up people with its sedans at their homes and other places in the City of New York and delivered them to their particular destination, whether it be hotel, boarding house, or club, in Sullivan and Ulster Counties, within a twenty mile radius of Woodburn, New York. The operation passed through the State of New Jersey, and was therefore interstate.

The application and affidavits showed that the service operated was dissimilar from regular route train or bus service, and went to whatever place the people wished to go. It was unscheduled, had no regular routes, and was a special form of interstate livery service.

The record also shows hearings had, references to the hearings by Crescent's attorney in communications to the Commission, and subsequent notices of hearings which followed protests filed by this and other objectors.

Through error or inadvertence, the Commission, on June 20, 1938, issued a compliance order improperly specifying the service rendered by Crescent, to which Hudson Transit Lines, Inc. and other objectors immediately filed protests. The Commission acted upon these protests, and referred the matter back to the field office for further investigation and determination with the result that the order of June 20, 1938 never became effective and never vested any rights in Crescent.

At this time, in other similar cases, a long litigation was commenced before the Commission which raised the question of how far the Commission could go in specifying the type of service rendered by a Grandfather operator, which, of course, would, when defined, constitute the basis of permission for continued future operation.

There never was any question as to the necessity for defining special operations as such, or non-scheduled and irregular route operations as such, but a question was raised whether Section 308 (a) of Title 39, U. S. Code, could

prevent the Commission from defining the type of vehicle to be used.

The Commission at first looked to a single phrase in this Section without reference to other parts of the same Section and other Sections of the same Act, and handed down a decision in——

Sullivan County Highway Lines, Inc., 21 M. C. C. 717, disclaiming its power to specify the type of vehicle. Chairman Joseph B. Eastman of the Commission strongly dissented in that case with the result that in that case, and in the

Nudelman case, 28 M. C. C. 91, the Commission corrected the error of its prior erroneous determination and properly held that not only did it have the power, but that Section 308 (a) required it to specify the type of service to be rendered, including all pertinent and necessary parts thereof.

This litigation did not terminate until 1941 when the Commission as a whole, with only one partial dissent, adopted the views of Chairman Eastman. Thereupon, the Commission proceeded to issue orders correctly specifying the type of Grandfather service in the Crescent case, and about one hundred other similar cases which had awaited final determination of the *Nudelman* case.

This is the reason for the lapse of time between the protested order of June, 1938, which never became effective, and the second hearing of December, 1938 on these protests, and the final compliance order of September 2, 1941.

The appellant, Crescent, protested the 1941 order and was given a hearing on briefs and answering briefs in connection with its petition to vacate said order. When Division 5 rejected its pleas, Crescent then appealed to the Commission as a whole, where again the matter was heard on briefs and answering briefs with the Commission as a whole

sustaining the action of Division 5. Then came the appeal to the statutory Court terminating in the decision written by Circuit Judge Learned Hand, and the findings of fact, conclusions of law, and judgment which were prepared and entered by the Court itself. From this judgment, dated February 27, 1943 and entered March 6, 1943, Crescent appealed and filed its petition on April 16, 1943, and served this appellee on April 22, 1943.

First Issue.

Appellant's claimed interpretation of U. S. Code, Title 39, Section 308 (a), is without any basis in reason. It contradicts the Section when read as a whole, is inconsistent with the other provisions of the Act, as contained in Sections 306 (a) and 307 (a), and is contradictory of the expressed purposes of the Transportation Act, formerly known as the Motor Carrier Act. Furthermore, it is contrary to the Act as interpreted by this United States Supreme Court in the cases of—

United States v. *Maher*, 307 U. S. 148, and *United States, et als.* v. *Carolina Freight Carriers Corporation*, 315 U. S. 475, 62 Supreme Court Reporter 722.

United States Code, Title 39, Section 308 (a) reads as follows:

> "Sec. 308. (a) Any certificate issued under section 306 or 307 shall specify the service to be rendered, and the routes over which, the fixed termini, if any, between which, and the intermediate and off-route points, if any, at which, and in case of operations not over specified routes or between fixed termini, the territory within which, the motor carrier is authorized to operate; and there shall, at the time of issuance and from time to time thereafter, be attached to the exercise of the privileges granted by the certificates such reasonable terms, conditions and limitations as the public convenience

and necessity may from time to time require, including terms, conditions, and limitations as to the extension of the route or routes of the carrier, the requirements established by the Commission under section 304 (a) (1) and (6): Provided, however, that no terms, conditions, or limitations shall restrict the right of the carrier to add to his or its equipment and facilities over the routes, between the termini, or within the territory specified in the certificate, as the development of the business and the demands of the public shall require."

Appellant claims that the last proviso contained in the section above quoted entitles it to a certificate unrestricted and without reference to the particular type of service it had rendered on and prior to the Grandfather date.

It is important to note that appellant is not seeking a certificate on proof of necessity and convenience, but rather a certificate through being exempt from proving necessity and convenience because of operation on and prior to the Grandfather date. Appellant's claim looks to this one portion of Section 308 (a) and ignores all of that section preceding the parts it stresses. That section commences with a mandate to the Commission requiring it to specify the service to be rendered, and the Grandfather section, to wit, 306 (a), gives the right to continue the same kind of operations rendered on and before June 1, 1935.

In hundreds of truck and passenger cases, the Commission has interpreted the law above referred to in such a way as to permit operation of a kind and character similar to that performed on the Grandfather date.

In the *Nudelman* decision, 28 M. C. C. 91, the Commission indicated many cases where the specification of service to be rendered necessarily included specification with reference to the type of vehicle.

In one of the latest cases in point, to wit,

Dominic Machise, Common Carrier Application, 27 M. C. C. 668,

decided July 27, 1942, the Commission again rejected the type of claim here presented by appellant.

Referring to Sections 306 (a) and 308 (a), the Commission said:-

> "The two sections are linked in subject matter, and must be read together. • • •
>
> The service rendered by a motor carrier involves a number of considerations, including such factors as commodities transported, equipment used, and degree of specialization in particular phases of motor carrier transportation. • • •
>
> Any other conclusion would not only disregard the difference in the essential characteristics of the two types of service, but also would be contrary to the national transportation policy, which requires us to foster sound economic conditions in the motor carrier industry."

In the case of *United States* v. *Maher*, 307 U. S. 148, at page 155, the Supreme Court said:

> "The recognized practices of an industry give life to the dead words of a statute dealing with it. • • • Such recognition is implicit also in the provision of Section 208A, 49 U. S. C. A., Section 308 A, that any certificate issued under Section 206 or Section 207 *shall specify the service to be rendered.*" (Italics ours).

In the case of *United States* v. *Carolina Freight Carriers Corporation*, 315 U. S. 475, the Court said:

> "As we indicated in Alton R. Co. v. United States, supra, the purpose of the "grandfather clause" was to assure those to whom Congress had extended its benefits a "substantial parity between future operations and prior bona fide operations. • • • And consideration was given to the characteristics of irregular route carriers and their role in the national transportation system. That involved a weighing of specific evidence in light of the complexities of this transportation service. The judgment required is highly expert. Only

where the error is patent may we say that the Commission transgressed. That is not this case."

The Court further said:

> "By Section 208 (a) the certificate must specify 'the service to be rendered' by the carrier."
>
> "Common carriers which are expected to maintain regular service for the movement of freight in whatever quantities offered to and from all points on specified routes cannot operate economically and efficiently if other carriers are permitted to invade such routes for the sole purpose of handling the cream of the traffic available thereon in so-called irregular-route service."

The claim of appellant in its statement as to jurisdiction that its contention is supported by the Carolina Freight Carriers case is contrary to the fact.

The action of the Commission condemned by the Supreme Court in the Carolina Freight Carriers case was the unnatural freezing into a precise pattern, which had the effect of changing the basic characteristics of the Grandfather service as it had actually been rendered.

In the instant case, the Commission, on the undisputed proof in the case, has, by its order, given Crescent everything which it claimed to have had on the Grandfather date, and has effectuated a substantial parity between the authorized operations and its prior Grandfather operation.

What appellant really complains about is that the Commission did not give it something else for which it had neither Grandfather rights nor a claim to on the basis of proof of necessity and convenience.

Appellant asks for a certificate entitling it to conduct a type of service never rendered by it on and prior to the Grandfather date. It asks for a certificate worded the way it desires instead of worded by the Commission in such a way as to carry out the statutory mandate.

The United States Supreme Court has said that it is up to the Commission to weigh the evidence and exercise its expert judgment on the intricacies of the transportation problem. That Court, in the case of—

United States v. *Carolina Freight Carriers Corporation*, 315 U. S. 475

said:

> "We express no opinion on the scope of the certificate which should be granted in this case. That entails not only a weighing of evidence but the exercise of an expert judgment on the intricasies of the transportation problems which are involved. That function is reserved exclusively for the Commission."

The prime purpose of the Motor Carrier Act was to provide regulation and foster sound economic conditions in the motor carrier industry and to prevent chaos. This was expressed in the preamble of the Act itself. Appellant's interpretation, if accepted, would permit carriers to change their type of service as the demand arose without any proof of necessity and convenience respecting such changed type of service. One needs no imagination to realize the chaos that would result. Not only would the Commission be virtually stripped of all power of regulation by such interpretation, but the competitive result would destroy all but the strongest carriers.

The United States Supreme Court, in a number of cases, has said that the preamble may be referred to to ascertain intent, and that the Court will consider the evil intended to be remedied.

Price v. *Forrest*, 173 U. S. 410;
Rector v. *United States*, 143 U. S. 457.

The same Court has held that the objects and policy of the law will be considered in interpreting it, and that the

entire statute must be considered rather than giving undue effect to particular words or clauses, and that the intent of the law may not be defeated by rigid adherence to the strict letter.

Helvering v. *New York Trust Co.*, 292 U. S. 455;
Costanzo v. *Tillinghast*, 287 U. S. 341;
Barrett v. *Van Pelt*, 268 U. S. 85;
Fleischman v. United States, 270 U. S. 349.

Appellant ran a specialized, irregular route, livery type service, with flexible seven passenger sedans.

As Commissioner Eastman said in his dissent in the *Sullivan County* case, 21 M. C. C. 717:

> "I think it clear that the character of service which was rendered on and before the Granfather date was differenfiated by the use of the vehicles of the sedan type. • • •
>
> Applicant should, I believe, be restricted to the use of vehicles of the sedan type."

In his dissent to the first Nudelman decision in 22 M. C. C. 275, before that was reversed by Division 5 and by the Commission as a whole, 28 M. C. C. 91, Chairman Eastman said:

> "I believe that applicants should be limited in the type of vehicle that they may use. The Joint Board recommended a limitation to automobiles of the sedan type. The Examiner recommended that the service be limited to transportation of not more than six passengers in any one vehicle, which is perhaps a better way of accomplishing the same result."

These views of Chairman Eastman were subsequently adopted by the entire Commission. They clearly indicate that the Commission, in defining and specifying the type of service in the Crescent order appealed from, was not attempting to do by indirection something it felt it could not

do directly, as appellant contends. It recognized the fact that the limitation of the passengers carried was the same as the limitation of the type of vehicle to that type used on the Grandfather date in those cases where the type of vehicle constituted one of the essential characteristics of the specialized service.

Appellant's pretense in its statement as to jurisdiction that it is permitted to operate forty passenger buses, but only to carry six people in them, is quite contrary to the fact. It has no right to operate vehicles under its Grandfather claims which would change the personalized, flexible, livery type service previously operated by it.

The details attendant upon specifying the type of service constitutes a function exclusively reserved for the Commission. Nothing in this case indicates that the Commission erred in this respect, but, on the contrary, its interpretation is the only reasonable interpretation which can carry out the statutory mandate to the Commission and effect the avowed purpose of the Act itself.

Appellant's claimed interpretation, when analyzed, presents a frivolous rather than a substantial issue.

The learned decision of Circuit Judge Hand is clear and convincing.

Appellant's contentions are not worthy of further argument on this its main issue.

Second Issue.

The second issue of appellant alleges error to the Court in affirming the action of the Commission in specifying Crescent's service as a door to door, irregular route, non-scheduled, special, operation.

The objection to the declaration of its type as special operation is particularly frivolous because, except for regular route operation (which Crescent was not, as indicated

by its uncontradicted applications and proof), the Commission may not grant a certificate not specifying particular routes in passenger carrier cases unless the grant be as a special operation.

United States Code, Title 39, Section 307 (a). (Last sentence).

Likewise the obligation of the Commission, in Section 308 (a), to "specify the service to be rendered" justified its description in the other respects above mentioned.

As indicated by the Supreme Court in the Carolina case, the scope of the certificate entails the weighing of the evidence by the Commission and the exercise of its expert judgment, and this function, as the Court said, is exclusively reserved for the Commission.

The distinction between regular and irregular routes has been repeatedly recognized by the Supreme Court, and one of the latest cases in which it recognized this was—

Royal Cadillac Service v. *United States*, 63 Supreme Court Reporter, 158,

where the Supreme Court granted motions to affirm the judgment of the statutory court.

It is interesting to note that the same interests and the same counsel which sought to break down the law in the Royal Cadillac case are now appearing as and for the plaintiff in this instant case.

Appellant's claim in its statement as to jurisdiction that its operations were regular route operations is so contrary to the undisputed facts that we will merely refer the Court to Crescent's own applications contained in the record, and to the many affidavits Crescent filed with the Commission, which are also in the record, indicating its type of Grandfather service. Its claim to dissimilarity with certain types of operation termed by the Commission as special operations is wholly irrelevant.

The Peninsula and Red Star operations were sightseeing operations, and therefore special operations, but all special operations are not sightseeing operations. Appellant might just as well have claimed that because an orange is fruit, all fruit must be an orange.

It is noteworthy in the findings of fact prepared by the Court itself, in Paragraph 7, the Court stated:

> "The certificate issued on September 2, 1941 truthfully (specifies) the service rendered by the plaintiff and its predecessors as of June 1, 1935."

The second issue of appellant is even less substantial than the first and constitutes no justification for further argument.

Third Issue.

The third issue of appellant is its claim that the order of September 2, 1941 was entered without any procedure or evidence to sustain it.

Suffice it to say that the undisputed evidence of Crescent's own proof sustains the order, and the transcript in evidence of the Commission's record indicates notice and hearing with action by the Commission upon all of the evidence after it had finally settled the issue of law litigated in the Nudelman case above cited. The record shows that hearings were had, and the Court below found that there had been such hearings. In addition, it must be remembered that appellant had full hearing before Division 5 of the Commission, and likewise on its petition for reconsideration had further hearing before the Commission as a whole. It is true these hearings were had on written argument, based upon appellant's own undisputed factual record, but this in law is sufficient as previously determined by the United States Supreme Court in the case of *Morgan* v. *United States*, 298 U. S. 468.

Likewise, the claim made that the Commission made no findings to justify its order of September 2, 1941 is without

merit as reference to this order will indicate. The order itself found that Crescent on June 1, 1935 had operated according to the specification of service contained in the order, and contained the statement that the Commission so found, whereupon it proceeded with the order for the issuance of certificate. These constituted sufficient findings to justify the order.

It is not necessary to make detailed findings, or to set out the primary evidence considered.

Visceglia, et als. v. *United States*, 24 Federal Supplement 355.

Appellant's third issue is likewise unsubstantial.

Conclusion.

Appellant presents no substantial issue requiring further argument.

The statute is clear, and the decisions of the highest court of our land clearly show that appellant is entitled only to authority for operations having a substantial parity with its prior grandfather operations. This is what it asked for in its applications. This is what the Commission gave it. Its claims, however specious, are particularly unsubstantial and fall within the precedent of *McArthur* v. *United States*, 315 U. S. 787.

The questions raised on this appeal are so unsubstantial as to require no further argument.

The annexed Motion to Affirm should be granted.

Respectfully submitted,

James F. X. O'Brien,
Attorney for Appellee,
Hudson Transit Lines, Inc.
17 Academy Street,
Newark, New Jersey.

Dated: May 5, 1943.